

Self Determination and Indigenous People: The Fight For ‘Commons’

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Abstract

History has always seen the less-privileged as the one suffering the alienation of their rights, entitlements. It is equally true that these communities have fought back to claim what is rightfully theirs. The principle of Self determination or the right to decide how to be governed can be traced back to World War-1 and the principles laid down by Woodrow Wilson. This right to Self determination exists for each one of us. This becomes even more imminent when it belongs to a community which has its own preserved culture to protect, it has its own resources of which it is the foremost protector. Here the paper emphasizes how the tribals in India have now been reduced to a mere dependant and beggary. The paper traces the various changes of the Indian legal system governing the relationship between the ‘Commons’ and the Tribal Communities. But ‘the history of Forests is the history of conflicts’. The researcher has taken two case studies- the struggles of the Dongria-Kondhs of Odisha and the Sentinelese from Andaman , to show how these communities have in their own unparalleled ways protect their Commons from the never-ending appetite of the industrialization and human greed. Lastly, the researcher has analysed various provisions from the Corpus of Indian laws, to find out where is the State missing out. Along with it, the researcher has also suggested potential reforms to those lags , so as to guarantee the Tribals their “Right of Self Determination” in wholesome.

Keywords: *Commons, Self-Determination, Tribals, Indigenous People, Conflicts, Tribal Advisory Councils, Constitution.*

Introduction

“*A thing that we share and enjoy jointly*”(here after ‘Commons’), the significance of which has been taken from the way a mutual land was utilized among a commune in medieval Europe, i.e. ‘it was “held in common’.⁶ Absence of exclusive property rights except a right to enjoy the benefits out of it which is to enjoyed by all in the community. This defies the conventional rules under the Transfer of Property Act, 1882(Criteria for ownership is the mentioned Act which requires Right, Title and Interest over the property).

A community who is dependant on the forest resources , have a single forest shared by all. Also, the term ‘*khirkai/gaathan*’ brings forth the importance of this dependence⁷. The water bodies, resources (lac, resin, tendu patta), cremation grounds, connecting roads and other government created community assets are of utmost importance. The sharing and caring behaviour of such community people is important in the current times especially when the resources are depleting at an exponential rate, human beings are becoming greedier

day by day.

For the adivasis who make 8.6% of the total population” according to the “Census 2011 report”, secluded from the mainstream, consider these forests ‘safe haven’. Tribal communities have been enduring gradual disappearance of their original habitats and annihilation of their cultures through predatory involvement. Making them mere wage earners with uncertain and non existent futures from self sufficient owners of resources. There is one more dimension to it. A Senior Forest Officer of West Bengal mentioned in an interview that “the participation of the locals is one of the reasons for the increase in the forest cover.”⁸ It is important to highlight that the participation at the grass root level is essential for the environmental well being and for the realization of tribal rights. The paper shall review the recent events which reflects how in the current times for the sake of economic growth the State has transformed itself protector has itself turned into ravisher of indigenous communities.

State's Rough-and-Tumble with Forest Community's 'Right To Exist' (Findings and Discussions)

Various propounders, starting from the great E.P Thompson⁹ to the Karl Marx¹⁰, have portrayed in their writings the hostility between the state players and the forest communities.

In India like most of its counterparts, the forest communities owned and shared their natural resources. 3rd of August 1865 brought an upheaval when the report of the then-in-charge of forests in Burma culled away rights of forest dwellers (tribal).¹¹ This initiated assertion of state monopoly rights over jungles. A law was enacted putting an end to the exclusive right of the indigenous people on the surrounding resources. Forests were now differentiated under The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 into: Reserved forests, protected forests. Baden Powell stressed here that "In olden days, native rulers used often to set aside considerable areas of forest land as hunting grounds." Colonial bureaucracy intentionally misused this practice from yesteryear turning those lands and its resources into the property of Colonialists through the rule of succession."¹²

The modern India carried forward its "British inheritance" by creating a department for Forests and keeping "The Indian forest act, 1927". The diminutive transition of such right from being an 'exclusive right' to mere concessions conferred by the 'state' has caused destructive displacement of unimaginable forest dwellers resulting in the destruction of the symbiotic relationship between nature and its people/protectors. The vices of getting benefited from the rich flora and fauna of the forest have substantially jeopardized the very existence of forest dwellers. They are in present deemed as trespassers to the forest and categorized as torch bearers of extremism. It is not a new concept but a hobby of the tyrannical government since time immemorial. Not only the centre, but the various state laws have been implementing amendments to antique laws constraining the rights of the tribals, in favour of industries and real-estates.¹³ The new law has widened the nature of the cultivable lands allowing use of land for suitable for the capitalists. Also by placing the said Law/s in the 9th Schedule of the Constitution, the Government has successfully tried to avoid judicial review.

In 2016, in a collusive bid between the Odisha Mining Corporation (hereafter, OMC) and the state

government (hereafter, Government), 1400 acres of forest area was to be diverted for iron ore mine.¹⁴ The state government successfully obtained a permission from the MoEF by including in the diversion proposition seven (exact) repetitive gram sabha resolutions. These proposals reflected a presumed free consent of the seven villages, and also expressing that they are not using the said lands for the purposes of agriculture, in-habitation, or any other sustenance. It was later found that all the seven proposals were actually so designed by a coterie of OMC and the Government.

DONGRIA KONDHS, ODISHA, INDIA

The Dongria Kondhs are one of the particularly vulnerable tribal groups of the State of Odisha. They consider the Niyama Hills as 'sanctum sanctorum', which defines their cultural, economic and social realities. These people proudly refer these hills as Niyam Raja as their God. "It is unthinkable to detach links between the tribes and forest"¹⁵. "The Government of Odisha agitated the lives of the indigenous people when it began to disport over 660 hectares of 'forest land' for mining by the a Mining Company in the districts which are one of the most resource enriched area of the State. What resulted next was nothing less than history. The battle was raised in forms of not-so-silent marches and rallies, the sounds of which reached from a tiny community in Kalahandi and Rayagada to the Wall Street and Madison Square. Their story was considered similar to that of the Na'vi Tribe of the Oscar winning movie Avatar. It is a matter of deep concern that the conventionally educated are still lagging behind to understand what Dongria Kondhs have realised and are much ahead in working on it by playing their own part in the larger scheme- Of saving biodiversity-rich forests of Niyamgiri. Thirty-eight water resources have their source-point from Niyamgiri hills and forests like this are a defence against climate change. No argument can be stronger when it is said that our Mother Nature is truly safer in the hands of the local people and that's the message they have sent out to the world. Dongrias are unaware about private ownership of resources because for them their community is everything. Here the Apex Court of India in the case of *Odisha Mining Corporation Limited v. Ministry of Environmental Forest Supreme Court of India, (Writ Petition (Civil) No. 180 of 2011)*, came upheld the customary and cultural rights of tribal community over Niyamgiri and right of self determination of the Indigenous People in accordance with the Forest Rights Act, Panchayat

(Extension to Scheduled Areas) Act, and provisions of the Constitution thus instilled the authority of the gram sabhas to protect customary habitats and cultural rights. The mining corporation has still built a refinery in the northern Part of the Niyamgiri hills. This has displaced a large number of indigenous. The land grants are limited to the people actually displaced. Not only this, the operation of the refinery has started affecting the surrounding. What would be very much welcome here is just and equitable rehabilitation package keeping in consideration the inflation indexed economic sustenance a land or house which must be market-price indexed. The Indian Law on Rehabilitation which is still in limbo could be brought into enforcement on a mission mode. Also, It is very much true that Maoist insurgency has established itself within the state of Odisha and the insurgents are looking for innocent residents of under developed areas for recruitment. So if State uses violence, then the tribal will not hesitate to retaliate.

Sentinelese, Andaman and Nicobar Islands, India

Best described as the world's last stone age tribe, the Sentinelese tribe of North Sentinel island of the Andaman and Nicobar Island, India. The country gained the recent limelight when an American national was killed when he tried to contact the said tribe. It has been alleged that he supposedly went with an object to preach the word of Jesus among the unapproachable part of the human community. The Sentinelese tribe, unlike its other counterparts, are devoid of any outside contact, except a few instances.¹⁶ "*The Andaman and Nicobar (Protection of Aboriginal Tribes) Regulation, 1956*" expressly "prohibits any kind of taking photograph/videos of aboriginal tribes; encroaching, hunting and poaching in reserve area and imposes an imprisonment of 3 years and fine". Any person who wants to enter into a reserved area can do so with a pass under the authority of the Chief Commissioner, following certain restrictions and conditions as provided under Section 7, The Andaman and Nicobar (Protection of Aboriginal Tribes) Regulation, 1956. This was brought in to force to maintain the pristine environment from the rapid pace of economic growth and the greed of the human race. The Andaman islands stands near to the world famous strait of Malacca which enjoys the distinction of being second busiest trade and tourism routes. This seemed to be a great opportunity for widening the tourism industry in the islands.

The government which has exercised the policy of non-intervention till 1991 by not even carrying the census survey, has now suddenly opened the closed doors of such a pristine tribe to the outsiders. Thus the Indian government removed the restrictions in 29 islands where the Restricted Area Permit mandatory under the Foreigners (Protected Areas) Order 1958.¹⁷ It is also important to stress here that the Indian citizens/tourist require no such permission. The Andaman Authorities have pursued to establish the direct sea path instead of reaching the islands through the Jarawa creek.¹⁸ The famous 'Jarawa creek' is a lonely planet in itself. It is the residing place of the primitive tribes, the population of whose have reduced to two-digit. Detached from rest of the planet, they are the marvel of the modern international. The Sentinelese have been categorized as one of the most untouched tribe, leading to their diminished immunity against external pathogen. The curiosity of few many so called new world inhabitants has led them to tread in to the dreadful. Not only the tribes, but the Island itself is so pristine surrounded by lucid waters, magnificent coral reefs and one of the most peculiar wetland of the world which is considered as a hot spot of wildlife inhabitants. It is essential to reiterate and stress upon the symbiotic relationship between the tribes and the environment in which they have sustained themselves.

The Stopping Point (Suggestions and Conclusion)

The current government has successfully ensured that the role of the adivasis are limited to tongueless stamps.

Hobbes in his book "*The Leviathan*" has explained that to escape from the harsh, brutish and unforgiving natural condition of the human beings, a central authority is imminent. It will aid the men to exist with other human beings in harmony as men by nature are war-mongering. But it should not be ignored that the Hobbes has missed out the wellfarist nature of the state, when he portrayed State only as a Brute Police Force. The state cannot limit its welfare policies to the dead-letters of Law. *The Panchayats (Extension to Scheduled Areas) Act 1996* entitles the people with a right of self rule, self determination. The principle of self rule was defied when the 'Restricted Area Permit' was removed with out any discussion or consultations with the inhabitants. It is also saddening enough to see that it was the State Government (the 'so-called protector') brought the plunderers (The Mining Corporation) to the

doorsteps of NiyamGiri Hills. Starting from Hobbes to the current day luminaries, all of them have stressed upon the idea of an individual bestowed with the control to decide any matter affecting him/her. This right being partially restricted under the Social Contract Theory (by Marsilius of Padua) does not devoid him of self determination. It is not arguable that the state believes in the concept of *Parens Patriae*. But the 'Parent' has to keep in consideration 'the best interests of the child' while taking any decision with respect to the child.

The Article 244 of the Constitution of India has instilled in the Governor and the Tribal advisory councils (TAC) with the duty to administer (control) the 5th Schedule areas. Now this may seem to be an epitome of a successful grass root level governance. But examining colonial acts of 1919 and 1935', the current provisions in Constitution are nothing but an old wine in a new steel (nearly unbreakable) bottle.¹⁹ The new law is more restrictive and control-centrist. The TACs are filled with systemic deficits: it is devoid of legislative or financial powers, 1/4th of the composition of the TAC are not characterized, a complete diminution of the role of the Governor from a constitutional authority to a mere annual-report writing body, plus the powers of the Governor are blurry. Here it is necessary to make these two bodies as strong and accountable in favour of the tribals. In the Memorandum to President Pranab Kumar Mukherjee, submitted by Adivasi Samanvay Manch, Bharat it was found that in most of the states, the Chief Minister's of the state are holding the chair of TACs and in many other areas, the Chairperson is a Non-ST. The decisions taken for the governance by these TACs and scheduled areas has to wait for the assent of the President, thus defeating the very objective of the grass root level governance. The Governor has to take decisions regarding the scheduled areas on the basis of the consultation with the TACs and not the Council of Ministers. Finally, the PESA Act, 1996, which granted autonomy in self governance to such areas, have been repeatedly non-implemented, and this has led to forceful implementation of the two-tier system of governance.

In light of the above whims and fancies of the Government, it is commendable to consider that the two tribes: the Dongria Kondhs and the Sentinelese, have in their own established incomparable ways have let the world know that they are not modern day colonies of the 'State', that they will do what they are required to do save their existence, their commons, their sanctorum. But at the end of the day, these groups do not fall on

the powerful side of the system. How long can they fight for their commons, with the limited resources they possess? The United Nation's 'Declaration on the Rights of Indigenous Peoples' stresses on the right of self determination, right of free, prior informed consent as a cardinal rule of Right to exist of the the Indigenous People. It is very essential to empower them, their agencies of governance by working in the following directions:

- i. Funding should be localized.
- ii. Giving clarity to the discretion of the Governors,.
- iii. The Governor of scheduled areas must rein their regulatory role and dispose it successfully in the favour of the deprived.
- iv. The TACs should have a better say and control on the funding and the implementation
- v. The Chairperson of the TACs must be a ST, who can better understand the problems of the tribals.
- vi. A strong political push to work out the enforcement in the favour of the communities on a mission mode

The indigenous are the essence of our motherland. We trace our culture, customs, existence from them. It is a matter of great shock that the fore-moving engine of growth and development is failing to carry on within it the greatest stakeholder. The Government, the civil society and the communities themselves have to come together to make this symbiotic functioning of governance, growth and successful human existence a reality.

Conflict of Interest- Nil

Source of Funding - Self

Ethical Clearance- The author has used a doctrinal method for research. All the information and discussion in the article in the paper is based on author's own analysis based on the data secured on Informed consent and available publicly.

References

1. Anderies J. & Janssen M. Sustaining the commons, 1st ed, 2013
2. United Nations Development Programme, Recognition of community rights under forest rights

- act in Madhya Pradesh and Chhattisgarh: Challenges and way forward, [Internet] [cited on 2018 December 21]. Available-at : <http://www.undp.org/content/dam/india/docs/DG/recognition-of-community-rights-under-forest-rights-act-in-madhya-pradesh-and-chhattisgarh-challenges-and-way-forward.pdf> , 2012
3. Singh SS. India's forest cover up by 5,871 sq km, 2015 The Indian (newspaper online), (cited on 2019 February 22) Available-at: <http://www.thehindu.com/news/national/other-states/indias-forest-cover-up-by-5871-sq-km/article6896830.ece>
 4. Thompson E. P. Whigs and Hunters: The Origins of the Black Act . Harmondsworth: Penguin; 1975
 5. Marx K. "Debate on the Law on Theft of Wood"; reprinted in Karl Marx and Frederick Engels, Collected Works, Volume I . Progress: Progress Publishers ;1842 reprinted 1975
 6. Joshi G. FOREST POLICY AND TRIBAL DEVELOPMENT, [Internet] Available-at : <http://www.culturalsurvival.org/ourpublications/csq/article/forest-policy-and-tribal-devel-opment>, 1989
 7. Powel B.H B. A Manuel of Jurisprudence for Forest Officers: Being a Treatise on the Forest Law. Government Press, Calcutta; 1882 p.47
 8. Kukreti I. Jharkhand govt doesn't have legal rights over 38% of its forest, Down To Earth. [newspaper on Internet]. 2019 January 5. [cited on 2019 March 16]. Available-at: [https://www.downtoearth.org.in/news/forests/jharkhand-govt-doesn-t-have-legal-](https://www.downtoearth.org.in/news/forests/jharkhand-govt-doesn-t-have-legal-rights-over-38-of-its-forest-62690)
 9. Choudhry C. Disempowering Gram Sabhas. The Hindu. 2019 March 20: 13.
 10. Malhotra S.G. Tribal Autonomy Undermined: Fifth schedule Areas, [Internet] Available at <http://www.epw.in/web-exclusives/tribal-autonomy-undermined.html-0>, 2014
 11. "Here's Everything About The Sentinelese- 'Uncontacted Tribe' Living In Andaman & Nicobar Island. Indiatimes[newspaper on internet]. 2018 November 26 [cited on 2019 Feb 15]. Available at : <https://www.indiatimes.com/news/india/here-s-everything-about-the-sentinelese-uncontacted-tribe-living-in-andaman-nicobar-island-357198.html>
 12. Andaman Government Tourism Department. Entry Formalities For Foreigners [Available on Internet]. Andaman. Government Department; 2017 [cited on 2019 February 15] Available at : <http://www.andamans.gov.in/html/entryformality.html>
 13. Grig S. Survival International statement on killing of American man John Allen Chau by Sentinelese tribe, Andaman Islands. [Internet][cited on 2019 march 15] Available at <https://www.survivalinternational.org/news/12031>
 14. Nayakara V. Fifth Schedule: a critique ,The Deccan Herald ,[2018 January 1] [Internet] [cited on 2019 January 6] Available-at: <https://www.deccanherald.com/content/651307/fifth-schedule-critique.html>